

NOTES REGARDING E.O. 10501

AND COURT DISCUSSION ON 29 JUNE 1972

1. PURPOSE OF E.O. 10501

a. As the author of some of the language in E.O. 10501, and having participated in its processing as originally published as E.O. 10290, I propose that the "promulgation history" be accorded a degree of consideration commensurate with "legislative history" of a statute.

b. Preciseness of language seems to be central to the reason for existence of the Ellsberg-Russo case. Everyone engaged in the pursuance of dismissal or acquittal should be conversant with E.O. 10501 purpose, policy and application. Popular ideas about the order cannot substitute for facts.

c. During World War II, the Office of War Information (Elmer Davis) was given the function of coordinating security standards in the regulations of the various and numerous executive branch agencies. The first O.W.I. coordinated regulation was issued September 28, 1942 (O.W.I. Reg. No. 4). In May 1943 a Security Advisory Board was established in O.W.I. to perform the coordinating function. That board continued to function after World War II until its functions were absorbed some time before 1950 by a committee under the National Security Council.

d. The Security Advisory Board originated the effort to draft an Executive Order that would be directive upon heads of agencies with respect to standards for safeguarding defense information requiring protection to preclude damage to the nation. The purpose was to replace "voluntary coordination" with Presidential standards. Drafting of an order began at some point before 1948. Later, the National Security Council took over the drafting.

e. Eventually, the draft was promulgated September 24, 1951, as Executive Order 10290. Its content was largely a re-print of existing agency regulations (especially the Air Force regulations).

f. E.O. 10501 was promulgated November 5, 1953 as a revision of E.O. 10290. The information-security system remained the same. There were three significant changes:

(1) Elimination of the Restricted Classification category, leaving only Confidential, Secret and Top Secret.

(2) Substitution of "national defense" and "defense information" for "national security" and "security information."

(3) Establishment of narrower dissemination criterion.

g. The purpose of E.O. 10501 was, and is, to provide an administrative system within the Executive branch for SAFEGUARDING OFFICIAL DEFENSE INFORMATION THE UNAUTHORIZED DISCLOSURE OF WHICH

1 COULD, AT THE LEAST, BE PREJUDICIAL TO THE DEFENSE INTERESTS OF  
2 THE NATION. The order was not promulgated to protect "classified  
information."

## 3 2. MEANING OF CLASSIFICATION CATEGORIES

4 a. The E.O. 10501 categories of Confidential, Secret, and  
5 Top Secret simply represent different DEGREES OF DAMAGE which  
6 could result from unauthorized disclosures of official defense  
information requiring protection in the interests of National  
defense (section 1).

- 7 (1) Prejudicial, or  
8 (2) Serious damage, or  
9 (3) Exceptionally grave damage.

10 b. There is NO Executive branch definition of information  
itself that could delineate between an item requiring protection  
and one not requiring protection.

11 c. The term "classified information" does not accurately  
12 reflect the information covered by E.O. 10501. The correct term-  
13 inology is "CONFIDENTIAL DEFENSE INFORMATION," "SECRET DEFENSE  
14 INFORMATION," "TOP SECRET DEFENSE INFORMATION," OR "CLASSIFIED  
DEFENSE INFORMATION" IF REFERENCE IS MADE TO THE THREE CATEGORIES  
OF INFORMATION COLLECTIVELY.

15 d. A classification marking is authorized ONLY to identify  
16 material containing INFORMATION ALREADY CORRECTLY CLASSIFIED  
17 ACCORDING TO SECTION 1. An item of information either qualifies  
18 or does NOT qualify for classification, or retention of an assigned  
classification, on the basis of the SUBSTANCE - DAMAGE FACTOR PLUS  
A DETERMINATION BY APPROPRIATE AUTHORITY -- NOT ON THE BASIS  
WHETHER IT HAS A CLASSIFICATION MARK. ( Section 5, E.O. 10501)

19 e. The existence of a defense classification on an item  
20 of information CANNOT be considered conclusive as to whether it  
21 qualifies for protection in the interests of national defense.  
22 This applies whether or not the information has been recorded  
23 or incorporated in document or other material. According to section  
24 4 of E.O. 10501, INFORMATION MUST BE DECLASSIFIED WHEN PROTECTION  
IN THE DEFENSE INTEREST IS NO LONGER REQUIRED. Immediately after  
its assignment, a classification is subject to cancellation.  
Section 4 (f) of the order specifically provides for any recipient  
of classified material to challenge the validity of the classif-  
ication marking.

25 f. As further emphasis to the point that a classification  
26 action within the Executive branch cannot be considered conclusive,  
27 such action reflects the exercise of Presidential authorization.  
28 A defense classification can exist only in the exercise of exec-  
29 utive (command) responsibility for safeguarding the information.  
30 Any authority at a level higher than the one which assigned a  
31 classification can use the information as unclassified if it serves  
his functional interests to do so. Neither the President nor any

1 lesser official can be bound by a defense classification assigned by  
2 a subordinate!

### 3 3. DISSEMINATION OF CLASSIFIED INFORMATION

4 a. As in the case of classifying defense information, its  
5 dissemination is made as an executive (command) responsibility.  
6 The key requirement in section 7 of E.O. 10501 is (1) for heads  
7 of agencies to provide for dissemination, and (2) that dissem-  
8 ination shall be permitted as stated in the order. The dissem-  
9 ination criteria exist to serve operational requirements of those  
10 persons in the Executive branch who have functional responsibility.  
11 Any disclosure that serves the executive function is an authorized  
12 disclosure. Any person to whom the disclosure was made can only  
13 be viewed as an "authorized" recipient (person).

### 9 4. APPLICATION OF E.O. 10501

10 a. E.O. 10501 is NOT AN OPERATIONAL REGULATION. It does  
11 NOT apply to ANYBODY as an operational directive. The only persons  
12 to whom it has any application as a directive are HEADS OF EXEC-  
13 UTIVE AGENCIES. Every action required by the order is directed  
14 to agency heads.

15 b. Although a reader can see in the order what the various  
16 heads of agencies are required to do in implementing it, the order  
17 does NOT constitute guidance for personnel of the respective agen-  
18 cies. CERTAINLY, IT CANNOT QUALIFY AS HAVING ANY APPLICATION TO  
19 PERSONS OUTSIDE THE EXECUTIVE BRANCY, or be of USE to such persons.

20 c. Even after 21 years since promulgation of the first  
21 order, E.O. 10501 is NOT considered by the Department of Defense  
22 as having any legal standing for reference in the Security  
23 Agreement that is executed with contractors. The agreement  
24 (DDform 441) makes the handling of information bearing classificat-  
25 ion markings, as designated by the Executive branch, STRICTLY A  
26 MATTER OF MUTUAL CONTRACTUAL OBLIGATION. The Executive order is  
27 not even referred to in DD form 441, although its existence is made  
28 known to a contractor by DoD notification that detailed contract-  
29 ual security requirements furnished by the government reflect  
30 applicable Executive orders. (Paragraphs 1 and 2, I.S.M.)

### 22 5. FLEXIBILITY OF E.O. 10501

23 a. As additional emphasis on the point that E.O. 10501  
24 exists to serve the functional responsibility of the Executive  
25 branch, and is not suitable as conclusive guidance to anyone  
26 outside the Executive branch, section 14 permits modification of the  
27 policy by the Department of Defense. That department may develop  
28 its own standards for handling and disseminating classified defense  
29 information in combat or in combat-related operations.

### 27 6. EXCLUSIVENESS OF E.O. 10501

28 a. Section 1 of E.O. 10501 clearly shows that there is

1 no possibility of a relationship between the three classification  
2 categories and law UNLESS SOME STATUTE SHOULD EXPRESSLY PROVIDE  
3 FOR USE OF THEM INDIVIDUALLY (Confidential; Secret; Top Secret).  
4 No statute provides for any such use.

5 b. Sections 12 and 13 also show that the authors of E.O.  
6 10501 knew that they were providing an ADMINISTRATIVE system  
7 which had no relationship to law.

8 c. As indicated in paragraph 4 above, the authors of E.O.  
9 10501 did not expect the order to be of any use outside the  
10 Executive branch.

#### 11 7. 18 U.S.C. 793

12 a. "793" as currently worded existed before any Executive  
13 order on classifying and safeguarding defense information was  
14 issued. There was never any such Executive order until a year after  
15 enactment of the Internal Security Act of 1950, which gave the  
16 statute its present wording. Therefore congress could not possibly  
17 have had in mind an Executive order as serving to implement  
18 18 U.S.C. 793.

19 b. While it is true that the practice of assigning class-  
20 ification markings to information existed in Executive branch agen-  
21 cies at the time of the Internal Security Act of 1950 was enacted,  
22 the classification systems varied from agency to agency. Classif-  
23 ications meant different things to different agencies. Some  
24 of the classifications had no relationship to national defense.  
25 There is no basis whatsoever to suggest that any one of those  
26 numerous classification systems was considered by Congress as  
27 constituting guidance for anyone to use in connection with the  
28 interpretation or application of 18 U.S. C. 793.

29 c. The Prosecution (Nissen) twice reflected on 29 June  
30 the view that "classification" does not determine whether inform-  
31 ation relates to the national defense (transcript: page 1649,  
32 line 1: page 1695 line 19). This would seem to indicate that he  
33 could not depend on E.O. 10501 to give any guidance for the app-  
34 lication of "793". However, he continually expressed the belief  
35 that the dissemination criteria in the order, as interpreted by  
36 him, must be used in determining who is "not entitled to receive  
37 it."

38 d. Surely it should be clear from past cases that 793  
39 is not limited to information qualifying for a defense class-  
40 ification. The Executive order criteria could not possibly be of  
41 assistance in cases involving information excluded from the order.  
42 If E.O. 10501 cannot serve as a standard under 793 in one case,  
43 it is inconceivable that it would be the standard in another case  
44 under 793.

45 e. It is also clear, and should be emphasized, that 793 is  
46 NOT A SECRECY LAW, such as 798 and 35 U.S.C. 181-184 as covered in  
47 paragraphs 9 and 10 below. Legislative records show that when  
48 Congress intended that information be kept secret from American

1 citizens it was meticulous in specifying (1) the information, and  
2 (2) the delegation of authority to designated persons. 793 is to  
3 PRECLUDE INJURY TO AMERICAN CITIZENS, NOT TO KEEP INFORMATION  
4 FROM THEM.

5 8. 18 U.S.C. 798

6 a. Nothing in 798 refers or relates to E.O. 10501 or any  
7 other Executive order or any so-called classification regulation.

8 b. As in the case of 793, section 798 existed as presently  
9 worded BEFORE there was any Presidential classification system.

10 c. The purpose, scope and effect of 798 is severely  
11 restricted and quite specific in the language of the statute  
12 itself, except:

13 (1) A United States Government Agency is authorized  
14 by the STATUTE to DESIGNATE information for limited or restricted  
15 dissemination. The word "CLASSIFIED" serves no useful purpose in  
16 the statute. "DESIGNATED" is the key word. Congress would have  
17 enacted the same law if "classified" had been left out.

18 (2) The statute is clear on the point that an "un-  
19 authorized person" is one who has not been authorized by the Pres-  
20 ident or the head of a Presidentially designated department or  
21 agency to receive the controlled information.

22 d. The distinctions and designations required by the statute  
23 need not be effected under E.O. 10501 or any other Executive order.  
24 Section 13(b) of E.O. 10501 reflects the fact that matters covered  
25 by 798 are considered as being separate from information subject  
26 to the procedures in the order.

27 e. Policy, procedures, and the actual designations made  
28 by the Executive branch as authorized by 798 are contained in  
"Secret" documents developed within the National Security Council  
organization. They and their predecessors were purposely excluded  
from the provisions of the original E.O. 10290 as well as E.O.  
10501. They certainly are not available to the public for guidance  
regarding the application of 798.

9. 50 U.S.C. 783(b)

a. Nothing in 783 refers or relates to E.O. 10501 or any  
other Executive order or any so-called classification regulation.

b. As in the case of 793 and 798, section 783 existed as  
presently worded before there was any Presidential classification  
system.

c. Although the word "classified" is used in the statute,  
the word "designated" would more clearly represent the distinction  
made with respect to the information involved.

1 d. The information sought to b protected cannot be  
2 referred to as "classified information" since that term is not  
3 in the statute. The only information referred to in 783(b) is  
4 information classified (designated) by the President...AS AFFECTING  
5 THE SECURITY OF THE UNITED STATES. Shorthand misrepresentations  
6 cannot substitute for law.

7 e. Even if Executive order 10290 had been in effect at the  
8 time 783 was enacted, Congress unquestionably would have been  
9 wise enough not to depend upon the order as having any implement-  
10 ing relationship to the statute. Executive orders are changed  
11 to suit administrative wishes of the Executive branch. Executive  
12 order 10501 specifically discarded "security of the United States"  
13 as a factor for determining "classification." The only "classific-  
14 ation" which that order authorizes is in relation to the  
15 NATIONAL DEFENSE.

16 10. 35 U.S.C. 181-184

17 a. The "Patent Application Secrecy Act" is one of the  
18 examples of "secrecy" legislation enacted to preclude publication  
19 or disclosure of information to people within or outside the  
20 United States. The purpose is to protect National security.

21 b. Congress assured that the restrictions would be narrow  
22 enough and specific enough in terms of national security and in the  
23 delegation of implementing authority that there is no impact on  
24 the First Amendment or any other part of the Constitution.

25 c. Congress clearly provided IN THE STATUTE for the  
26 status and degree of secrecy to be maintained. There IS NO  
27 REFERENCE TO OR DEPENDENCE UPON ANY SORT OF "CLASSIFICATION"  
28 ORDER OR REGULATION. Neither E.O. 10501 nor any similar type  
29 of regulation would be needed to implement the statute, including  
30 the "disclosure" aspects as well as the determination of need  
31 for "secrecy."

32 11. FREEDOM OF INFORMATION ACT

1 a. 5 U.S.C. 552 (b)(1) recognizes that Executive orders  
2 can be issued for the purpose of keeping information secret  
3 in the interest of the national defense or foreign policy. Even  
4 though the statute was enacted in June 5, 1967 (14 years after  
5 issuance of Executive order 10501), Congress did not use the  
6 word "classified" to indicate the state of secrecy that was inten-  
7 ded. Neither did the Congress specify which Executive order would  
8 apply.

9 b. The popular view that Congress legislated a basis for  
10 the existence of Executive order 10501 and the classification  
11 system is wholly inaccurate. By 1967, Congress had developed a  
12 strong dislike for "classification." The matter of Executive  
13 order designation was left open in recognition of the possibility  
14 that the President could revoke, change, or initiate orders accor-  
15 ding to his own wishes.

12. CONCLUSIONS REGARDING SELECTED MATTERS DISCUSSED IN COURT  
29 JUNE TRANSCRIPT

A. "Not Entitled to Receive it." Page 1643 of the transcript is an example of the administrative-policy language Mr. Nissen uses instead of the exact language in a statute. Nissen used "entitled," which is not in the statute. He also referred to "national defense documents," which is not in the statute. Such language serves his purpose of attempting to convince the Judge that administrative policies can apply in this case. However, the statute applies only with respect to a specific item possessed by a person that is communicated to another person who is not entitled to receive it (the item) not "them."

b. Intent of Congress. Mr. Nissen's suggestions at the bottom of page 1645 and on other pages that Congress expected the President to implement 793 could have no basis in fact for the reasons reflected above. As indicated in paragraphs 8 and 9, Mr. Nissen's claims that Congress intended a relationship between E.O. 10501 and 798 and 783(b) have no basis in fact.

c. Rand Responsibility. The discussion on page 1647 between the Judge and Nissen about Rand shows ignorance of the fact that the head of Rand is the one who has responsibility under the applicable contract clauses. The discussion reflects speculation and fantasy.

d. Guarding of Information. Pages 1655 and 1695 reflect the view of Nissen that the existence of a classification marking on a document constitutes "guarding" of the document within the meaning of law. In practice, such is NOT true, considering the law and "classifications."

e. President Lincoln's Secrecy. Page 1662 reflects Judge Byrne's seeming tendency to view the use of the dictionary term "secret" as a formal classification system. There was none.

f. Misuse of "Classified." Judge Byrne is shown on pages 1673 and 1674 to have been seriously in error about the term "classified information" in 798, and whether there is relationship to E.O. 10501. His view that one must go to E.O. 10501 for guidance about "classifying" communications intelligence is wrong.

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July 1, 1972